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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 333

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, THE CHESAPEAKE & OHIO RAILWAY COMPANY, and CLEVELAND, CINCINNATI, CHICAGO & SAINT LOUIS RAILWAY COMPANY, who sue, etc.,

Appellants,

VS.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

BRIEF FOR APPELLANTS

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Appeal from the District Court of the United States for the Western District of Kentucky

BRIEF FOR APPELLANTS

This case is an appeal from an order of the court below entered in the above entitled cause on the 13th day of June, 1930.

The suit, in which the appeal is taken, was brought in the court below by the appellants as petitioners against the appellees, as defendants. The appellants, being five railroad common car-

(Italics herein are ours)
(R means Record)

riers subject to the Interstate Commerce Act, operating in the Western District of Kentucky and elsewhere in the United States, and suing for themselves and on behalf of practically all other railroad companies in the United States subject to the Interstate Commerce Act, instituted the suit to suspend, restrain, enjoin, annul and set aside, in part, two certain orders of the Interstate Commerce Commission, one entered on the 4th day of November, 1929 (R 10), and the other on the 30th day of July, 1929 (R 44).

The case was tried in the court below by three judges sitting as a district court (U. S. C., Title 28, Sec. 47, c. 32, 38 Stat. 208, 219, 220) and is here on a direct appeal from the order of that court (U. S. C., Title 28, Sec. 345, c. 229, 43 Stat. 936, 938, paragraph 4).

STATEMENT OF CASE

One of the Commission's orders complained of (that entered on the 4th day of November, 1929) was made in a proceeding, instituted on the 7th day of December, 1925, by the Commission on its own motion for an investigation into and concerning the use of private passenger train cars, including so called office cars, in the transportation of persons, with a view of making such order or orders in the premises as might be deemed by it warranted. This order was entered pursuant to its report and decision which was rendered June 21, 1929.

The other Commission order complained of (that entered on the 30th day of July, 1929) was

an amendment made by the Commission of its previous Pass Regulations changing them from what they were at the time of the Commission's said report and decision, and was made for the purpose of conforming the Pass Regulations to that decision.

In the investigation above referred to a proposed report was submitted to the Commission on the 23d day of July, 1928, and was served upon appellants and all other railroad companies, sixty days from the date of such service being allowed for the filing of exceptions, this time limit being afterwards extended so as to include December 22, 1928.

On the last mentioned date exceptions were filed by the Association of Railway Executives on behalf of its membership, which at that time comprised, and now comprises, substantially all of the Class I railroads in the United States as such roads are classified by the Interstate Commerce Commission, these roads representing about 97 per cent of the railroad transportation revenues and about 91 per cent of the railroad mileage in the United States.

Argument was duly heard on these exceptions, and on the 14th day of March, 1929, the matter was submitted to the Commission. Its decision, called a report, was rendered on June 21, 1929.

The Commission's report was broad enough to decide that, *for whatever purpose used and irrespective of the use*, it was unlawful for a carrier to transport free the office car of another carrier even though occupied by persons entitled to use and us-

ing free transportation. By the order, based upon its report, it directed the carriers to "cease and desist on or before January 15, 1930, and thereafter to abstain from the transportation or movement of private passenger train cars, including so-called office cars, of another carrier free or at other than published tariff rates." (R. 10-11.)

The amendment made by the Commission, on July 30, 1929, of its "Regulations to Govern the Forms and Recording of Passes issued in 1917" was to add between lines 11 and 12 in paragraph 15 the following:

> "A car pass may be issued only for cars owned by the issuing carrier or held by it under lease for use in its business as a common carrier. It may not be issued for other cars. *This provision is not to be construed as prohibiting the issuance of passes for cars of lines operated as a part of the same system.* See In the Matter of the Use of Private Passenger Train Cars, 155 I. C. C. 775." (R. 44-45.)

This amendment was made prior to the date of the Commission's order above referred to, but after its decision had been published.

This amended Pass Regulation, which is a detail in putting into effect the Commission's report, the appellants seek also to set aside in so far as it forbids the transportation of another carrier's office car when used as an instrumentality to transport a person lawfully entitled to use, and using, free transportation.

The Commission, in the order here in contro-

versy, summarizes the conclusions of its report in a statement of three propositions, thus:

> "1. That the transportation or movement of private passenger cars, including so-called office cars, of one carrier subject to the Interstate Commerce Act by another carrier free or at any other than published tariff rates is contrary to the provisions of the Interstate Commerce Act;
>
> "2. That it is unjustly discriminatory and unduly preferential and prejudicial to haul such private cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and revenues for the movement of privately-owned or chartered cars; and
>
> "3. That the transportation of persons in such private passenger cars, including berth and other accommodations, at the rate charged passengers provided only with ordinary coach accommodations is unjustly discriminatory and unduly preferential and prejudicial."

The appellants are not attacking the third of these propositions; in other words, there is no effort here to set aside that part of the Commission's order which relates to the *transportation of revenue passengers in business cars* at the rate charged passengers holding tickets good only in the coach. It is the purpose of the carriers to remove this discrimination in some satisfactory way. This leaves only the first two propositions in controversy.

The Commission bases the first of these propositions on its holding in its report (R. 28) that

the private passenger car, including the so-called office car, is *property* shipped and when owned by a carrier other than that making the movement its transportation cannot lawfully be free, but must be covered by a tariff charge. This we deny to the extent and for reasons stated *infra* in the argument.

The other proposition announced by the Commission deals with unjust discrimination and undue preference and prejudice, as between the free movement of such a carrier-owned car, on the one hand, and a charge for the movement of privately owned or chartered cars, on the other. This is also controverted by appellants to the extent and for the reasons hereinafter stated.

Before undertaking to discuss the two issues involved in paragraphs 1 and 2 of the Commission's finding, above quoted, which, we submit, are the only ones involved in the case, we invite the attention of the Court briefly to the ground on which the court below relied for its decision, and shall undertake later herein to show that the court had no power to raise and determine that issue. The court rested its decision on an alleged unlawful discrimination between the *pass* holder carried in the private car and the *ticket holder* carried in the coach. (R. 102-5.) *There was no finding by the Commission and no evidence in the record as to such unjust discrimination or undue preference or prejudice.* Especial attention is called to this at the outset so as more accurately to define the issues and because of the obvious misconception on which the court below decided the case.

The complaint before this Court is confined to the aspect of the Commission's order which holds unlawful the movement by a carrier subject to the Interstate Commerce Act of the private or business car of another such carrier *when such car is occupied by a person using, and lawfully entitled to use, free transportation.* The prayer of the petition in the court below was that it should adjudge, order and decree that the finding of the Commission referred to and its orders in connection therewith, are and have at all times been beyond the lawful authority of the Commission in so far, *and in so far only,* as they or either of said orders undertake to declare unlawful and to prohibit the transportation or movement free of charge by one carrier subject to the Interstate Commerce Act of the private or business car of another such carrier when occupied by a person using, and lawfully entitled to use, free transportation, and undertake to declare unlawful and to prohibit the accessorial transportation or movement of such car in connection with or as an incident to such free transportation service. The reference to accessorial services is necessary to cover the movement of such car to the point on the moving carrier's line where the free transportation is to begin or, after the free transportation is over, the movement back to the owning line.

We shall discuss in detail and in their order the Commission's first two propositions above quoted, the only ones here involved; but it is deemed appropriate at this point to state the general proposition that, if the Interstate Commerce Act permits

the free transportation or movement of office cars here contended for, it destroys the basis for a claim of unlawful discrimination in the absence of an affirmative showing that the lawful act is being used for the purpose of making an unlawful discrimination, inflicting an unlawful prejudice or creating an unlawful advantage, as between two persons similarly situated. No unlawful discrimination can exist *per se* in respect to an act permitted by the statutes. In other words, if the Act permits the transportation or the movement free, or at other than tariff rates applicable to property that is shipped, the Act thereby makes lawful a difference and creates an exception, thus taking the movement, to the extent indicated, out of the field of unlawful discrimination unless it is affirmatively made to appear that this lawful act is being used in an unlawful way to make an unlawful discrimination or to inflict an unlawful prejudice or to create an unlawful advantage as between persons similarly situated.

It becomes important, therefore, to consider how far the first proposition above quoted of the Commission is sound in law; that is, whether it is sound in law to hold that the movement by a carrier of a foreign business car, occupied by a person lawfully entitled to use, and using, free transportation, constitutes a movement of property shipped and must be covered by a tariff charge. If it is sound in law, it is unnecessary to consider the second proposition, for it disposes of the appellants' contention. If it is unsound in law, the

second proposition falls with it, in the absence of the affirmative showing above stated.

This subject of unlawful discrimination will be discussed in greater detail in a subsequent part of this brief beginning at p. 64.

It appears from the Commission's report that its first proposition rests upon its claim that the practice in question is violative of section 6 of the Interstate Commerce Act, the substantive provisions of which are that shipments of *property* must be made pursuant to a printed tariff duly filed, and that freight charges therefor must be paid in accordance with the tariff.

The second declaration of the Commission is that the practice is violative of sections 2 and 3 of the Interstate Commerce Act, forbidding unlawful discriminations, etc.

While the questions presented in this record are questions of law, it may be useful at the outset to explain briefly some of the uses and functions of what are popularly known as private, business or office cars.

In the Commission's report they are generally referred to as "private passenger train cars, including the so-called office cars" and this designation is followed in the petition, but what is meant is the railroad business or office car. Since the name "private car" is not accurate and is liable to be confused with cars, privately owned, of persons and of companies other than railroad companies, the cars involved in this controversy will, for convenience, be frequently referred to herein

as "office cars." When that term is used, this explanation will indicate what is meant.

These cars are described in the Commission's report in this case as follows:

> "It will be understood that a private car includes a kitchen, dining room, staterooms, and observation or sitting room, together with storage space and sleeping quarters for the cook and attendants." (R. 19.)

Much of a railroad officer's time is spent in traveling, not only over his own lines, but to points on the lines of other railroads, in connection with questions of management and operation as well as of financial and other executive policies of importance not only to his own road but to all the railroads of the country. As a part of the every-day business and affairs of his railroad, he must attend meetings and conferences with officers of other lines; must appear at hearings before the Interstate Commerce Commission and before State commissions; must be subject to the call of the President, of the Governors of States and other public officials concerned with matters and policies of transportation; and must attend meetings with civic, industrial and commercial bodies representing important public interests.

Such journeys frequently necessitate his absence from headquarters for weeks at a time. Day in and day out he is receiving and handling mail and business documents requiring his personal attention and executive authorization pertaining to the conduct of his railroad work in as great, if not in

greater, volume than is necessary in any other line of business. He must take with him important and voluminous papers and office assistance, as he is liable to be confronted with urgent matters of business requiring immediate attention yet not pertinent to the particular trip. The necessity arises, in the interest of expedition and successful administration, for the carrying of considerable records, files, correspondence, papers, profiles, blueprints and necessary clerical forces. He must have all these at hand in order to administer, without hurtful delay, the affairs of the railroad. He takes them in what is known as a private, office or business car and this car is, in reality, the same as his office and, for the successful conduct of his work, he requires much the same facilities for working on these journeys as are available at his headquarters. This is equally true whether he is on his own or on a foreign line.

Seasonal inspection trips of their own properties and the study and inspection of the properties of others are universally recognized as necessary to good management and as having high educational value. On these trips the President and other executive officials, and sometimes a part or all of the board of directors, compose the party. Not infrequently much time and expense can be saved by a short cut outbound or returning home over foreign lines.

It frequently happens that the President of a railroad company, in connection with the finances of his company and for the purpose of attending meetings of his board of directors, must visit finan-

cial centers like New York, Chicago, Boston and others, and this is as much true of carriers whose lines do not reach these centers as it is of those that do. As the necessity for attending to the financial affairs of his railroad and for consultation with and meetings of his board of directors may require long absences from his own line, it is essential that he should have at these off-line points his files and other necessary documents so that he may there attend to the daily administration of his company's affairs. These are carried and are made available to him and to his office force by these business or office cars.

In fact, the Commission's report in this case (R. 27) recognizes such car as an important facility for carrying on the business of the road, where it says:

> "The private cars of railroad officials are intended to be offices on wheels for those whose duties require considerable travel over the line, and when used for that purpose are an important facility for carrying on the business of the road." (R. 27.)

But its further comment, that it is seldom that these duties necessitate a movement of the car over other lines, is not justified. It states, however, that in some cases such a movement may be justified for business reasons, for example, where it avoids a very circuitous haul over the home line.

A striking instance of the latter is found in the case of the Rock Island. As is well known, it has its general offices in Chicago, but it is an important line coming into Memphis from the west. It

reaches Memphis by crossing the Mississippi River over a long bridge, and Memphis is a very important point by reason of the location there of extensive terminals. The President of the Rock Island can leave Chicago on the Illinois Central at 6:15 in the afternoon and traverse the distance of 527 miles to Memphis, reaching that point next morning at 8:20. This involves practically no loss of time, measured by business hours. On the other hand, if he is compelled to go to Memphis on his own line, he would have to go down into Oklahoma, travel a distance of 1,377 miles, over three separate divisions, through Herington and El Reno, with the result that, if he leaves Chicago, at say, 6 p. m. on Monday, he would not reach Memphis until 6:55 Wednesday evening.

Other illustrations of conditions which exist all over the country are the following:

On the Illinois Central the distance from Gulfport to New Orleans over the Louisville & Nashville is 66 miles and the time of a typical train between these points, moving over the Louisville & Nashville, is 2 hours and 15 minutes. Both these cities are important places on the Illinois Central and it is frequently necessary for the officials of that company to travel from one of these points to the other. If those officers confine themselves to their own line, they have to move from Gulfport north to Jackson, Mississippi, and thence from Jackson to New Orleans—a distance of 343 miles—as against the Louisville & Nashville distance of 66 miles. Furthermore, by reason of the fact that the movement is over two divisions, it takes 16 hours

and 15 minutes to make the trip from Gulfport to New Orleans over the lines of the Illinois Central as against 2 hours and 15 minutes over the Louisville & Nashville.

It is true, also, as the Commission indicates, that such cars are occasionally used by railroad officers for other than railroad business purposes.

The railroads recognize, however, that the indiscriminate use of business cars has led to abuses. On this subject the Commission in its report says:

> "It is urged that while the practice of transporting foreign-line private cars without charge is lawful our investigation has shown that the courtesy extended as between roads has in some instances been abused. It is proposed to correct such abuses by the adoption of a code of ethics limiting such courtesies and calling for reports to be rendered covering the movement of private cars on foreign lines." (R. 38.)

It is doubtless true that at times the use of office cars in the entertainment of shippers has been resorted to for competitive reasons and that this and other abuses, which doubtless exist to some extent, should be corrected. The Commission in its report recognizes the efforts of the carriers to correct them. But in case of abuses, the abuses themselves should be attacked, as was done in the *Tap Line Case,* hereinafter cited, and not an effort made to prohibit a lawful practice. The matter of abuses, however, is not the question presented on this record.

In fact, the Commission itself seems to take this view, for in its report it says:

> "These and other abuses are apparent from the returns, but we are here concerned primarily with the legality of the free transportation of the private cars of other carriers." (R. 27.)

ARGUMENT

The following is a summary of the main points involved in the argument:

1. The Interstate Commerce Commission has no powers except those delegated to it by Congress.
2. The movement is not a shipment of property subject to section 6 of the Interstate Commerce Act, which relates to property shipments.
3. The transaction here involved does not violate the discrimination provisions of the Interstate Commerce Act.
4. The lower court's decision was based upon an alleged discrimination not found nor even mentioned by the Commission and hence not in the case.

All of the assignments of error (R. 110) are to be urged.

I

THE INTERSTATE COMMERCE COMMISSION HAS NO POWERS EXCEPT THOSE DELEGATED TO IT BY CONGRESS

Before proceeding to define and discuss the issues here presented, it may be well to make brief comment on the power and jurisdiction of the Commission.

The power to regulate interstate commerce is, by

the Constitution, vested in Congress—not in the Commission. The Commission can exercise the power of regulation only in so far as such power is delegated to it by Congress. Even then, the Commission must follow, in exercising its functions, the standards set up for it by Congress. It has no independent powers.

The jurisdiction of the Commission is strictly statutory and is confined to the powers conferred by the Act.

> *Re Express Companies,* 1 I. C. C. 369.
> *Re Chicago, Saint Paul & Kansas City Ry. Co.,* 2 I. C. C. 253.
> *Railroad Commission of Kentucky v. Louisville & Nashville R. R. Co.,* 10 I. C. C. 173.

The following is quoted with approval by this Court in the *O'Fallon Case*:

> "The function of this commission is not to act as an arbiter in economics, but as an agency of Congress, to apply the law of the land to facts developed of record in matters committed by Congress to our jurisdiction."

—thus indicating, as is well understood, that the powers of the Commission are only delegated powers. *Saint Louis & O'Fallon Ry. Co. v. United States,* 279 U. S. 461, 487.

Congress has delegated explicitly to the Commission certain administrative powers in respect to regulation; for example, it has been given such powers in respect to safety appliances, in respect to accounts, in respect to the issue of securities, and in respect to "car service," which latter, in

precise and express terms, it limits to *vehicles, etc., used in the transportation of property.* Congress has carefully refrained, so far, from conferring authority in respect to *passenger service* similar to that it has conferred in respect to service for the transportation of property; and in fact has given the Commission no power to establish rules, regulations, and practices with respect to *passenger service* or to establish rules for compensation to be paid for the use in *passenger service* of any locomotive, car, or other vehicle not owned by the carrier using it, as it has done in respect to the freight service. *Interstate Commerce Act, section 1, paragraph (10).*

The Commission, under the Act, has no power to regulate the type, character, supply or use of vehicles used by a carrier in performing its passenger service.

Worcester Excursion Car Co. v. Pennsylvania R. R. Co., 3 I. C. C. 588.

Pacific Engineering & Construction Co. v. Chicago, Rock Island & Pacific Ry. Co., 56 I. C. C. 249.

Chicago, etc., R. R. Co. v. Pullman Car Co., 139 U. S. 89-90.

II

THE MOVEMENT IS NOT A SHIPMENT OF PROPERTY SUBJECT TO SECTION 6 OF THE INTERSTATE COMMERCE ACT, WHICH RELATES TO PROPERTY SHIPMENTS

In order to determine this issue, it becomes necessary to interpret section 6 of the Interstate Commerce Act in connection with paragraph (7)

of section 1 and paragraph (1) of section 22, and to determine whether it applies, when considered in connection with the other provisions mentioned, to the movement of an office car under the circumstances shown in this record.

The pertinent part of section 6 is the requirement that tariffs be filed showing the rates, fares and charges for transportation between points on its own routes and those of another carrier. For convenient reference, the pertinent parts of section 6 are here quoted:

> "(1) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation."
>
> "(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different

compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

The contention of the appellants is that upon four separate grounds, any one of which is sufficient, this section of the Interstate Commerce Act does not apply to the movement of an office car under the circumstances shown in this record:

(1) The movement of the car is not a *shipment of property* in the sense contemplated by section 6, which refers to freight shipped from consignor to consignee, for here the office car becomes a *facility of the carrying line* in which are carried persons for whom the carrying line would otherwise have to furnish facilities of its own.

(2) If, however, the car should be regarded as remaining for all purposes the property of the owning line, there is still no such shipment as section 6 contemplates, and the movement of the car would be simply *incidental to the free transportation* afforded its occupants.

(3) This interpretation, that the statute does not refer to the movement of an office car and hence no freight charges for such a movement must be paid, has been the *uniform contempo-*

raneous and practical construction of the Act by the Interstate Commerce Commission and by the carriers throughout the history of railroading in this country, and has been continuous up to the time the order here in controversy was issued. If the statute, by reason of this new claim of the Interstate Commerce Commission, be regarded as doubtful in meaning, this long continued contemporaneous construction by the governmental body charged with administering and enforcing it is of controlling weight with the courts.

(4) With this long continued construction of the statute by the Interstate Commerce Commission, presumably with the knowledge of Congress, the latter has repeatedly amended the Interstate Commerce Act, and the sections dealing with free transportation in particular, and in 1926 *it reenacted the entire Act, including these sections, without change.* Thereby, under a long line of authorities in this Court, such construction is read into the statute and becomes binding upon the courts.

The third and fourth grounds are similar, but not identical.

The first proposition, above quoted, of the Commission declares that any and all transportation or movement of office cars by one carrier for another or its officials, free or at other than published tariff rates, is contrary to the provisions of the statute. It thus includes in its condemnation the transportation or movement of such cars even though occupied by a person lawfully entitled to use, and using, free transportation.

Inasmuch, therefore, as the complaint in this

case is not as broad as the finding, the finding, for present purposes, may be thus stated:

> The transportation or movement of office cars, by one carrier for another or its officials, free or at other than published tariff rates, is contrary to the provisions of the Interstate Commerce Act, even though the car be occupied by a person lawfully entitled to use, and using, free transportation.

It will be observed that the finding seems to concede, as is true, that, in order for such transportation or movement to be unlawful, it must be "contrary to the Interstate Commerce Act."

There is nothing in the general law to make such transportation or movement unlawful. If it is unlawful, the prohibition must be found in the statute; and this is conceded by the Commission in the statement in its first proposition, that the practice is "contrary to the provisions of the Interstate Commerce Act." If the prohibition is not found there, no report or order of the Commission can make the practice unlawful or have any legal effect upon it. Certainly Congress has never delegated to the Commission any power or discretion with respect to free passes or free transportation of persons included in certain designated classes. From the first, Congress has been careful to keep that subject in its own hands and has refrained from conferring any jurisdiction in respect to it on the Commission.

The original Act to Regulate Commerce, approved February 4, 1887, provided in section 22 that

> "nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees."

This provision of the original Act, although there have been many amendments and revisions of the Act itself, has continued in force and it is today contained in the law without impairment, abridgment or change.

The provisions on the subject, as it is in the law now in force, will be found in paragraph (7) of section 1 and in paragraph (1) of section 22.

Paragraph (7) of section 1 expressly excepts from the prohibition against the issue of interstate free tickets, free passes or free transportation for passengers, a carrier's "employees and their families, its officers, agents, surgeons, physicians, and attorneys at law," and contains a further limitation upon the general prohibition of free transportation, as follows:

> "*Provided,* That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families."

And paragraph (1) of section 22 contains the provision above quoted.

In addition to the persons above excepted from the requirements as to payment for transportation, there are a number of others also excepted,

such as "ministers of religion," "persons exclusively engaged in charitable and eleemosynary work," "indigent, destitute and homeless persons," "inmates of the National Homes or State Homes for Disabled Volunteer Soldiers," and persons carried "with the object of providing relief in the case of epidemic, pestilence or other calamitous visitation."

The foregoing limitation upon the Commission's power in respect to the issue by carriers to certain classes of persons of free tickets, free passes or free transportation being express and not susceptible of change or limitation by the Commission, it only remains to construe it properly.

At the time of the enactment of this law and at the time of each of the amendments which have been made, there were well known and well recognized methods of giving this free transportation. It could be given by not exacting compensation for a passenger riding in one of the passenger coaches of the transporting company; in a Pullman car not belonging to the carrier; in one of the carrier's own private or official cars; or by transporting the passenger free in a private or business car of another line.

The report and order in question undertake to limit the power of the carrier only in respect to the last named method, namely, that of transporting the passenger in a car belonging to another line. It does not deny the lawful right of the carrier to transport a free passenger in one of its own coaches, in a Pullman car in use on its lines, or in one of its own official cars; and it bases the

distinction between the lawful right of the carrier to transport a passenger free in one of its own official cars, and the right to transport the passenger free in an official car of a foreign line, on the conclusion, which the Commission reaches, that such a car of a foreign line is *property under shipment and must be paid for as such.* It denies the right of a carrier to treat a foreign business car as a facility of travel and as a method of giving the free transportation which it has promised and the law permits.

An intelligent understanding of the statutes thus requires an examination of the status of foreign-owned passenger cars under different conditions on the line of the carrier performing the service.

1. A Railroad Office Car in the Movement Here Under Consideration Is a Facility of the Carrying Line and Ranks as Its Own for the Purposes of the Service

Undoubtedly a passenger train car belonging to one carrier may be an article that is shipped over the line of another as an article of commerce for delivery at a specified destination, as for example a new car shipped from the place of manufacture to the railroad acquiring it. In such a case it is treated as consigned property, or as an article of freight, must be covered by a tariff and the transportation must be paid for as freight; but it is also true that it may be an instrumentality or facility of commerce, in which case it is not an article to be transported as freight and is not required to be covered by a tariff or paid for by a transportation charge.

This distinction has been recognized and declared by the Commission itself in a number of cases.

In *McCloud River Ry. v. Southern Pacific Co.*, 56 I. C. C. 287, 290, 291, the Commission, in speaking of cars of other than carrier's ownership, said:

> "The use of such cars as instrumentalities or facilities of commerce in interchange service, in short, is a matter of contract, and whether they were accepted by defendants for such use in the present case or received as articles of freight for transportation to destination is a question of fact to be determined by the evidence.
>
> ". . . *it is within the discretion of carriers whether they shall receive and use cars of other ownership as facilities of carriage in* ***interchange service,*** and it follows that consent to do so in one case and refusal in another is not necessarily unlawful discrimination under the act to regulate commerce."

While it is thus stated by the Commission that it is within the discretion of carriers whether they shall receive and use cars of other ownership as facilities for the transportation service they are performing, it will be observed that a carrier would have no such discretion if a car was tendered to it as freight for shipment. Under the latter conditions its duty as a common carrier would be to accept, carry and deliver in accordance with its tariff.

The distinction between the two cases is clearly recognized by the Commission itself.

In *Pacific Engineering & Construction Co. v. Chicago Rock Island & Pacific Ry.*, 56 I. C. C.

249, the Commission, in discussing the difference between cars as articles of commerce and as instrumentalities of commerce, said:

> "While it is the duty of all common carriers subject to the act to furnish suitable and adequate facilities for all reasonable necessities of the business in which they engage, they are at liberty *to choose their own appropriate means of carriage. Worcester Excursion Car Co. v. Penn. R. R. Co.*, 3 I. C. C. 577. They are not common carriers of cars of other ownership employed solely as instruments of carriage, and *may decline to accept them for such purposes* in lieu of their own, although *bound to accept them when offered merely as articles to be transported.*"

In the case last cited, the question was whether the cars transported were transported as vehicles and facilities of commerce or as articles of freight for transportation to particular destinations. In respect to this matter the Commission said, at page 248:

> "The complaints and evidence are not directed to the amount of the charge assailed, but to the imposition of any charges as unreasonable in view of the use of the cars as transportation vehicles and the derivation of the same revenue from their lading as would have been obtained if the carriers' own equipment had been used.
>
> "A conclusion contrary to the complainants' contentions seems to us to have the better support. The cars were delivered to the carriers as articles, rather than as instruments of commerce, for transportation to particular destinations."

The distinction between cars used as vehicles and facilities of commerce and those shipped as articles of freight is here again distinctly recognized. The same distinction is adverted to and impliedly approved in the case of *Haffner Thrall Car Co. v. Northern Pacific Ry. Co.*, 146 I. C. C. 47, decided June 16, 1928.

This distinction is also recognized in the report of the Commission in the case at bar, 155 I. C. C., pages 786-7; and even as late as October 3, 1929, the Commission decided the case of *Furnas Ice Cream Co. v. Norfolk & Western Ry. Co.*, 157 I. C. C. 617, in which it says:

> "Complainant is not here seeking an order that would require the defendant to provide itself with special equipment to take care of its needs. On the contrary, complainant intends furnishing the car. What is here sought is an order establishing carload rates to be applied on the car which complainant intends to procure at some future time. Complainant's car is apparently *not to be offered as an article of commerce, but rather as an instrument of commerce.*"

and refers, as authority for the italicized statement, to two of the cases above mentioned, namely, *Pacific Engineering & Construction Co. v. C. R. I. & P. Ry. Co.*, 56 I. C. C. 247, and *McCloud River Ry. Co. v. S. P. Co.*, 56 I. C. C. 287.

It has always been recognized that, while it is the duty of all common carriers subject to the Act to furnish suitable and adequate facilities for all reasonable necessities of the business in which

they are engaged, they are at liberty to choose their own appropriate means of carriage (56 I. C. C. 249, *supra*), and, in order to furnish the appropriate means of carriage, such carriers may obtain them by construction, by purchase, by contract as in the case of Pullman cars, by gift, by loan, by lease or in any other legitimate manner. *Cases above cited* and *Judson on Interstate Commerce (3d Edition)*, section 299.

Indeed, by paragraph (4) of section 1 of the Act it is now expressly provided:

> "It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor . . ."

and by paragraph (3) of the same section it is provided that

> "The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, . . . etc."

This obligation and right have been recognized by the Commission itself from the beginning.

Thus, in the case of *William C. Scofield et al. v. Lake Shore & Michigan Southern Ry. Co.*, 2 I. C. C. 118, decided July 19, 1888, in the Cooley days of the Commission, the Commission said:

> "The law-making power has not taken upon itself the responsibility, nor has it clothed the

Interstate Commerce Commission with the power, and the responsibility, of directing a carrier to supply itself with any particular equipment of cars, or, in fact, with any equipment or cars at all, for the transportation of freight over its line. The responsible duty of supplying itself with a sufficient and proper equipment of cars is left by the statute to rest with the carrier, to whom alone it rightfully belongs, and if the carrier fails to do this in such a manner as it should, whereby others are injured or wronged, then that the carrier shall be liable for all the damages which result from such failure."

The Scofield case was a case relating to freight cars, but in the same year, 1888, the case of *Worcester Excursion Car Co. v. Pennsylvania R. R. Co.*, which involved the status of *passenger cars*, was presented to the Commission and was decided in April, 1890. In its decision the Commission says in this case relating to passenger cars:

"The statute has not relieved railroad companies from the duty of providing their own equipment, nor changed the method of providing it. They may do it by construction, by purchase, or by contract for their use. But no one has a right to compel a railroad company to select among these modes, or to contract with all comers. How cars shall be provided *is entirely matter of private contract.* And whether private cars of companies or persons shall be hauled is matter of discretion and private agreement."

Worcester Excursion Car Co. v. Pennsylvania R. R. Co., 3 I. C. C. 584.

And again, on page 588:

> "The law-making power has not undertaken to divide responsibility with the carrier in the selection of cars, nor has it clothed any civil tribunal with any such power. The responsibility of selecting safe, suitable, and sufficient car equipment for the transportation of passengers over its line *is left by law with the carrier;* and in the performance of this duty the carrier has rights and grave responsibilities resting upon it. Whether seated in a Pullman car or a Worcester car, passengers traveling over defendant's line would be the passengers of the defendant, and it would be entitled to receive and collect their train fare and responsible for their safe carriage; and as part of the transaction the defendant would have to pay to the company owning the car a reasonable rental for its use during the journey."

Not only has the carrier the right and is clothed with the duty of providing proper equipment for the service it renders in the transportation of passengers, but when it secures equipment belonging to another line and uses it in its own transportation service, such equipment *becomes its own for the purposes of the carriage.*

As is said in the case just cited, beginning at the bottom of page 584,

> "It has the right to supply its own road in that manner with vehicles suited to its business and to its line, and by voluntarily using them *they become the same as its own for the purpose of carriage.* Every company judges for itself what style of car it desires for

its passengers, and its reasons are unimportant so long as its patrons are properly served, *nor is it material how the cars are procured.* Whatever discretion of preference a carrier may exercise in the choice of passenger cars in its business is *outside of the statute and only an exercise of legitimate authority.* It relates to the physical operation of the road, for which the carrier is responsible to the public and to the law.

* * * * * *

"There is nothing in the Act to regulate commerce that indicates a different view on this subject so far as the mere physical operation of railroads is concerned *in the carriage of passengers.* That there must be no unjust discrimination, or unlawful preference, or undue prejudice or advantage, or disadvantage or extortion, is all true. But these cover a very different field from the power and duty of the carrier to legitimately *exercise the authority of selecting cars of its own choice for the transportation of passengers* over its line."

And again, on page 588, the Commission says:

"And in performing so extraordinary, and to some extent, hazardous service as that of transporting passengers over its lines, the carrier may well say that it will do so only in its own cars, or cars *which it has made its own* by selecting them for that purpose."

It will thus be seen that the Commission draws a clear distinction between the status of cars belonging to one company on the lines of another in cases where they are *shipped as articles of freight,*

and hence for tariff purposes are property, and cases in which they are *used as instrumentalities or facilities of transportation*, in which latter case they are not only not property or articles of freight, *but rank in law as the cars of the company moving them*.

This same principle—that the cars furnished by a carrier, even though belonging to another, while in its possession and use in rendering a transportation service, become its own cars—is declared by this Court. The Court says:

> "The defendant was under a duty, arising from the public nature of its employment, to furnish for the use of passengers on its lines such accommodations as were reasonably required by the existing conditions of passenger traffic. Its duty, as a carrier of passengers, was to make suitable provisions for their comfort and safety. Instead of furnishing its own drawing-room and sleeping cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendant's lines were supplied with the requisite number of drawing-room and sleeping cars, it was *a matter of indifference to the public who owned them*. . . . But we are of the opinion that public policy did not forbid the railroad company from employing the Pullman Southern Car Company to supply drawing-room and sleeping cars to be used by its passengers, and, as a means of inducing the

plaintiff to perform this public service and to incur the expense and hazard incident thereto, from giving it an exclusive right to furnish cars for that purpose. The defendant did not, by such an agreement, abandon the duty it owed to the public; for the cars so furnished, while in its possession and use, became, as between it and its passengers, *its own cars*, subject to such regulations as it might properly establish for the comfort and safety of passengers on its trains."

Chicago, etc., R. R. Co. v. Pullman Car Co., 139 U. S. 89-90.

This view is also emphasized by the case of *Pennsylvania Co. v. Roy*, 102 U. S. 457, where the Court says:

"For the purposes of the contract under which the railroad company undertook to carry Roy over its line, and, in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and porter, *were, in law, the servants and employees of the railroad company*. Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company."

See also 2 *Hutchison on Carriers, Third edition*, Sec. 916.

In respect to the question above discussed, in regard to the difference between a car shipped as freight and a car being used in the performance of a transportation service, the report of the Com-

mission in this case seems to recognize that this just and well known distinction presents a difficulty which the Commission, in order to uphold its conclusion, must remove, for it says (R. 33):

> "Passenger cars of one carrier are sometimes operated over the lines of other carriers in maintaining through service. The terms on which this is done are a matter of contract, but in the absence of other arrangement the owning line is paid certain amounts per mile or per diem under rules of the American Railway Association." (It will be observed here it is stated that the owning line is paid—not charged—for the use of its car.) "As in the case of freight cars, no charges are assessed for the handling of cars in service, but cars not in service are subject to the charges in the consolidated classification. *The criterion for determining when a passenger car is in service would seem to be the same as in the case of a freight car;* that is, whether the car is being handled for revenue purposes in the interest of all the carriers in the through route or solely for the benefit of the owning line."

This expressly recognizes the difference between the two classes, but it is difficult to perceive how the Commission can hope to sustain its criterion here announced for determining to which class a car belongs in any particular movement. The test of whether or not a car is in service cannot be whether it is producing revenue, as long as the law recognizes that certain *transportation services* may be rendered without producing revenue. The test is not whether the car is producing revenue,

but whether it is performing a transportation service.

For example, it is provided in section 22 of the Act:

> "That nothing in this Act shall prevent the carriage, storage, or handling of property free . . . for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibitions thereat, etc."

If a carrier undertakes, pursuant to this statutory authority, to transport property of the United States free in a car belonging to another carrier, it would not be a revenue service, but it would be a transportation service and the car in which the freight was loaded would be an instrumentality of transportation. According to the Commission's criterion, inasmuch as it was producing no revenue, it would not be in service at all and the non-owning carrier would have to charge the owning carrier for its use.

We would thus be confronted with this remarkable situation. The United States Government might be shipping munitions of war from the Washington Navy Yard to the Boston Navy Yard, involving a through route over the Pennsylvania and the New Haven roads. These munitions might be loaded in a Pennsylvania freight car, which would go through to destination over the Pennsylvania and the New Haven roads to the Navy Yard at Boston. The entire service, under the statute, might be rendered free. The Pennsylvania Railroad, owning the car, need not charge

for it, but when the same car is delivered to the New Haven and the shipment is moved by it from New York to Boston, the New Haven, under the criterion of the Commission, would have to charge the Pennsylvania for its use, because it would not be a revenue movement, but a free movement, of the munitions. The Commission's criterion, producing such a result, cannot be sound as applied to the case of freight.

But the Commission concedes that the criterion for determining when a passenger car is in service is the same as that for determining when a freight car is in service. If the revenue criterion fails in respect to a freight car, it must, by the Commission's own concession, fail also in respect to a passenger car. In the case of a person permitted by law to travel on a pass, and actually traveling on a pass, the carrier which has issued the pass, in hauling him over its line unquestionably performs a transportation service. The inherent nature of the service is not affected by the fact that the carrier is honoring its own free pass. The carrier's contract with the pass holder is to furnish him free transportation service.

Throughout the report statements occur which indicate that, in the opinion of its author, when one carrier hauls a car belonging to another carrier, occupied by a person entitled to use and using free transportation, the first carrier is performing the service for the foreign line carrier; whereas an accurate analysis of the situation shows that the service is not being performed for the other carrier but is being performed to carry out the

moving carrier's own contract for free transportation, which under the statute is lawful.

Nor does the carrier, as to such passenger, lose its character as a common carrier. In the celebrated *Lockwood case* it was argued before this Court that a carrier in hauling a passenger free under the terms of a pass which it had issued, lost its status as a common carrier by entering into a special contract with the passenger exempting itself from liability for negligence.

In dealing with that argument this Court said:

> "We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such *by virtue of their occupation, not by virtue of the responsibilities under which they rest.* Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts, also, losses by means of *any* superior force, and any inevitable accident. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders

him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of his goods?

". . . But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character."

Railroad Co. v. Lockwood, 17 Wallace (84 U. S.) 376-7.

The accurate and sound reasoning here used in effect declares the principle that it is the nature of the employment, and not the mere incident of a special contract about it, which determines whether or not a carrier is a common carrier. And likewise the argument would seem to be sound that it is the nature of what the carrier is doing in transporting a passenger and not the mere incident of whether it secures revenue for the service, which determines whether or not the carrier is performing a transportation service.

It being universally true that a carrier, in providing itself with facilities to perform its transportation service, does not *charge* the owner of the facility in which the service is performed for its

use, but more frequently, as in the case of freight cars, and even of passenger cars, *pays* the owning company a per diem for their use, there would seem to be no ground whatever for the contention that when a carrier undertakes to perform a transportation service for a person to whom it has agreed to furnish free transportation and does so in a vehicle which it obtains from another, it should be required to charge, or even justified in charging, the owner of the vehicle for its use.

The Commission in effect admits, as it should, that the law permits a carrier subject to the Act to carry passengers of the designated classes free in its own coaches, in Pullman cars which it hires or operates under contract, and in its own private or business cars. There is no reason to justify the conclusion that the carriage of the same passenger, including the car in which he travels, free, becomes unlawful if he is transported in a car which the carrier borrows from another company or which the other furnishes for the purpose; for the Commission expressly states, in *Worcester Excursion Car Co. v. Pennsylvania R. R. Co.*, 3 I. C. C., at page 584, that "*it is not material how the cars are procured.*"

From the foregoing authorities and considerations it seems abundantly evident that when a carrier is moving a car belonging to another company, occupied by a person lawfully holding its pass or contract for free transportation and as the selected facility for furnishing the transportation service, it is not moving property belonging to another in the tariff sense or as a shipment of

freight, but is simply performing a transportation service in a vehicle which it has selected and thus made its own for the purpose, and is not obliged, under the law, to make a charge for the movement of it.

The carrier has the right, in honoring its contract for free carriage to a passenger, to select the vehicle in which the service is performed.

Perhaps it will be conducive to clear thinking on this subject to disregard, so far as this *property* point is concerned, the *character of the car* in which the transportation is made, and to consider it from the standpoint of the foreign-owned car being merely a day coach. If a number of the officers and employees of one carrier, holding passes enabling them to free transportation, wished to travel over the line of another, and the moving line did not have a day coach convenient in which to give the transportation, would any one suggest that the moving line would not have a right to secure from the other carrier the use of one of its coaches for the purpose? And, in that case, would any one suggest that the movement of that day coach filled with pass-holding passengers, would be the movement of *property* for which a charge should be imposed?

The Commission, to maintain the issue on its part as to the movement of the car being a movement of property, refers in its report to two cases, neither of which, we submit, has any bearing upon the question.

In neither of them was any question presented as to the movement of a car, not owned by the

carrying company, as a facility or instrumentality of its transportation service.

The first of these cases is *American Express Co. v. United States*, 212 U. S. 522.

In this case the question was whether, under the exceptions of paragraph (7) of section 1, a *package*, admittedly an article of freight and not a facility of transportation service, could be transported free under an express frank; and not whether a facility or instrumentality of commerce belonging to another, but being used by a carrier in the performance of its own transportation service—not being handled as an article of freight—might be lawfully transported free. This Court held that the package was *goods* and that the exception to the Act was not broad enough to permit the free carriage by such carrier of such *goods*.

The other case on which the Commission relies is *Interstate Commerce Commission v. Baltimore & Ohio R. R.*, 225 U. S. 326.

In this case the question was whether railroad companies might charge a different rate for the *transportation of coal* to a given point for a railroad than it charged to other shippers, the coal being intended for the use of the railroad as fuel. This is in no way parallel to the case at bar and did not involve in any sense a facility being used for the purpose of rendering a transportation service. It being obviously an *ordinary freight service*, the Court held that such articles as fuel coal must be carried for all alike.

We submit that there is nothing in either of these cases to sustain the Commission's view.

2. The Car Is in Any Event an Incident to the Free Movement of the Passenger

By reference to the statute it will be observed that, in authorizing the use of free transportation, the statute does not undertake to define how the service of free transportation shall be rendered. It does not impose a limitation on its character nor upon the facilities or instrumentalities that may be furnished. It may be in any vehicle which is safe and suitable for the purpose and which the carrier making the movement may select and provide. There is likewise no limitation imposed by law to prevent such carrier from accepting or securing from another carrier the vehicle in which such transportation service is to be rendered nor as to the terms on which such vehicle may be secured. It is fair to say that the Commission in effect admits that the free pass, authorized by law to be issued, may, as an incident of its issue and use, be honored in a Pullman car or in a private or business car of its own, and need not be confined to passage in a day coach. (R. 32.) If this be true, as it undoubtedly is, it is lawful to treat the movement of any car, whether owned by the carrier or not, which it uses to carry out its promise, lawfully made, of free transportation, as an incident of such transportation and as included in the statutory authority to issue and honor free passes and other forms of free transportation. In no respect is it a shipment of freight.

In both the aspects of this transaction hereinbefore discussed there is wholly lacking an essential element of a freight shipment under a tariff,

and that is *the right to demand this transportation.* No such right exists with reference to the movement of an office car. Handling it is purely a matter of choice on the part of the carrying line.

In respect to the point now being discussed the court below, in its opinion (R. 105), says:

> "... when Congress authorized the carriers affected by the Act to give free tickets or passes to their own officers and employees and their families, and to exchange with other such carriers passes for their officers and employees, we must assume that Congress used the words 'free ticket,' 'free pass' and 'pass' in the sense that those words are commonly and ordinarily understood. A pass or a free ticket, as ordinarily understood, connotes free transportation in the ordinary way and with the usual conveniences afforded the paying public. To construe the permission to grant free passes and free tickets, contained in Section 1 (7) and Section 22 (1), as authorizing not only free transportation of the holder, but transportation in a private car with all the conveniences thereof, would amount to a distortion of the language used and a perversion of the central purpose of the Act."

It is undoubtedly true that we must assume that Congress used the words "free ticket," "free pass" and "pass" in the sense that those words were commonly and ordinarily understood. The fact, however, is that it was universally known, not only to the public generally but to Congress, at the time that those words were put in the Act that the giving of free transportation has, from

the beginning of railroad history in this country, included, and up to the time of the Commission's decision in this case did include, whenever a carrier desired to furnish it, the free passage not only of the person but of the foreign-owned business car in which he was carried. And it is respectfully submitted that these words must be interpreted in the light of that practice of which judicial notice will be taken, and not given the narrow construction which they are given by the District Court.

While a contract for free carriage of a person does not give such person a contract right to demand to be carried in a private or business car, yet the carrier contracting to give him free passage may select its own means of carrying it out and may elect to perform it in a private or business car secured from another. "It is not material how the car is procured." *Worcester Excursion Car Co. v. Pennsylvania R. R. Co.*, 3 I. C. C. page 584.

In the next succeeding paragraph of this brief it is shown that the interpretation of the words just given was well known to the Commission and has been accepted and acted on throughout the 42 years of its history. And in paragraph 4, *infra* p. 63, of this brief it is shown that this construction was expressly made known to Congress in the *Five Per Cent Case*, the record of which was printed as a Senate document (R. 119).

3. The Practice, Well Known to the Commission, Has Been Both Impliedly and Expressly Recognized By It as Lawful Throughout the 42 Years of the Commission's History

(a) *Construction Given by Commission*

If the foreign car was property being shipped as freight and thus subject to tariff charges, the Commission has all the time known that it was the duty of the carriers in such case to make and file tariffs under the provisions of section 6 of the Act; and it has also known that no such tariff had ever been filed covering a case in which a foreign car was moved when occupied by a person using, and lawfully entitled to use, free transportation (R. 97).

Moreover, the question of the legality of the practice of carrying free the car of another company when occupied by a person entitled to use, and using, free transportation was, in the year 1911, presented to and considered by the Commission in what is known as the *Tap Line Case*. There it was declared by the Commission to be unlawful for an officer of a tap line to use free transportation, on the ground that he was using it for the purposes of a proprietary lumber company, which it considered unlawful, and was, because of its illegal use, taken out of the statute permitting free transportation of persons—not referring particularly to the car. But the Commission in that case states that the passes before it, in some cases, called for the movement of "car and party," thus showing that it had knowledge of the practice,

and it refrained from declaring the free movement of such car as unlawful. The Commission says:

> "With scarcely an exception the officers of the tap line are officers of the lumber company in the interest of which it is owned and operated. Throughout the record it was frankly admitted that they make use of the privilege of free transportation extended to them by the trunk lines even when traveling on the business of the lumber company and in the capacity of an officer of the lumber company. In one case 'car and party' passes are shown to have been used. This is another of the advantages to industries that own short lines serving their plants, and which they have caused to be incorporated as common carriers. The use of such free transportation we regard as altogether improper and unlawful, even though the holder may be an officer of a tap line that we have found to be a common carrier. The affairs of the proprietary lumber company are so interwoven with the affairs of the tap line as to make it impossible to admit the right under the law of an officer of a tap line to use free transportation."
>
> *The Tap Line Case*, 23 I. C. C. 277, 298.

Again, in 1913, in the *Colorado Free Pass Investigation*, the Commission shows that it knew of the practice, and it failed to condemn it on the ground that it was unlawful to move, without charge, the car of another company. It says:

> "An example of a car and party pass given to an officer of one of these lines was shown of record, and, as the facts are understood, was wholly improper, having undoubtedly

been intended as a special favor to one connected with an industry having a large interstate traffic, the good will of which was thought to be worth cultivating in that form."

Colorado Free Pass Investigation, 26 I. C. C. 491, 494.

Here again the Commission had the opportunity of condemning the practice on the ground that it was *unlawful* to move the car of another company without charge, but refrained from doing so, placing its decision on the ground that the "car and party" pass was "intended as a special favor to one connected with an industry having a large interstate traffic," etc.

Again, in the *Five Per Cent Case*, in 1914, in considering what the carriers in Official Classification territory might do to increase their net revenues, the Commission issued a questionnaire to the carriers in the territory referred to, one of the items in the questionnaire being headed as follows (R. 119).

"Statement showing the private cars moved over the lines of the respondent during the year ended June 30, 1913, *on passes* or other free authority issued to other than respondent's officials and employees, the approximate expense of handling such cars, and the revenue that would have accrued to respondent if cars had been moved at tariff rates."

Responses were made by the carriers, and the movement of such foreign cars free and without tariff charges was by these answers shown to be an habitual practice. This questionnaire and the

responses will be found in Senate Document No. 466, 63d Congress, 2d Session, at pages 6796-7, the record in the *Five Per Cent Case* having been printed as a Senate Document (R. 119).

The Commission here again had an opportunity to declare the practice unlawful, but refrained from doing so and impliedly treated it as lawful, because in its report in that case it was merely *suggested* to the carriers that they might conserve their net revenues if they would voluntarily curtail the practice and not permit it to be so extensive. *The Five Per Cent Case*, 31 I. C. C. 351, 410.

If the practice had been considered by the Commission unlawful, it could easily have so held, and it would have been the duty to so hold, and there would have directly connected revenues which it merely "recommended" might be conserved by a voluntary restriction of the practice by the carriers. In that case, at page 410, the Commission says:

> "The practice of granting free transportation of passengers and private cars, although less general than formerly, in part because of prohibitory legislation upon that subject, is still a heavy burden upon the railway passenger service, and it is recommended that the practice be still further restricted by the carriers."

The "prohibitory legislation" here referred to is undoubtedly that restricting the free carriage of persons, as there has been no other.

From the publication of the record in this case as a Senate Document, it will be observed not only

that the Commission knew of the practice and failed to declare it unlawful—in effect accepting it as lawful—but that *Congress itself knew of the practice*.

In respect to the Commission's attitude regarding the practice, as indicated by the foregoing, we are also enlightened by the Commission's express announcements. It has deliberately expressed itself in a way that cannot be mistaken, both in Conference Rulings and in its "Regulations to Govern the Forms and Recording of Passes."

In the aspect of the case now being considered, it is important to determine what is included in the free passes and free transportation which the law permits to be given and what the Commission has, in its administration of the law, considered and treated as so included.

Manifestly, the free carriage of persons does not authorize only the free carriage of their naked persons. It contemplates the free carriage of persons with property on their backs and in their baggage. Clothing and baggage are property and, notwithstanding this, may, by universal concession, be lawfully carried as a part of the free transportation which the law permits. Accordingly, the question presented in this aspect of the case is, how far free transportation of persons may be extended lawfully to include things incidental to such carriage although they may be, in a sense, property.

Inasmuch as there is no limitation imposed by the law upon the kind of transportation that can be furnished free, it seems clear that anything

that properly may be used and is used as a part of that transportation may be carried free. The permission may be for free travel for a person alone, or for a person and his baggage, or for a person to be transported in any vehicle appropriate for the purpose. This has been fully recognized in the Conference Rulings of the Commission itself, made after the change in 1906 of the wording of the law in respect to free carriage and since continued in force until after the report in this proceeding. In these Conference Rulings there is a provision, paragraph (c) of Ruling 95, reading as follows (R. 116):

> "Every pass to an officer or employee of a carrier other than the one issuing the pass shall indicate the name and rank of the person to, or on behalf of, whom such pass is issued, *as well as the name of the carrier employing him.*"

The corresponding provision of the Pass Regulations, paragraph (d) of Regulation 17, is as follows (R. 61):

> "A pass for an officer or employee of a carrier other than the carrier issuing the pass must show the title or occupation of the person to whom the pass is issued *and the name of the carrier by which employed.*"

So that, to comply with the Commission's ruling and with its Pass Regulations, a pass issued by one carrier to an officer or an employee of another must state on its face the name of the carrier employing such officer or employee. This is

not true, under the Commission's rules, when a carrier issues a pass in favor of one of its own officers or employees, as will appear from paragraph (a) of section 17 of the Regulations Governing the Forms and Recording of Passes, issued by the Commission, effective January 1, 1917, which reads as follows (R. 61):

> "A pass for an officer or employee of the carrier issuing the pass must show the title or occupation of the person to whom it is issued, e. g.,
>
> "Pass John Smith, account of brakeman."

Thus a pass for an officer or employee of the carrier issuing the pass need not show the name of the carrier by which employed. A pass in this form indicates that it is a pass for an officer or employee of the carrier issuing the pass.

On the other hand, as above stated, these Regulations, as to passes issued by one carrier in favor of an officer or employee of another, reiterate the requirement of paragraph (e) of Ruling 95 of the Conference Rulings above referred to, paragraph (d) of section 17 of the Regulations reading as follows (R. 61):

> "A pass for an officer or employee of a carrier other than the carrier issuing the pass must show the title or occupation of the person to whom the pass is issued *and the name of the carrier by which employed,* e. g.,
>
> "Pass John Smith, account of brakeman, A. & B. R. R."

Bearing in mind these requirements as to the form of passes when issued by a company to one

of its own employees, and the form required when issued to an officer or employee of another railroad, in the former the name of the railroad on which employed not being used, while in the latter the name of such employing railroad being necessary, we find in the Conference Ruling above alluded to that the form of pass set out by the Commission as one which in express terms it says *would be recognized by the Commission as legal* when the pass is issued by a carrier in favor of an officer or employee of another line, is as follows (R. 115):

> "Pass John Smith, President, *car,* and five officers and employees of the X. Y. Z. Ry."

The same form of pass is recognized by the Commission as lawful in section 15 of its Pass Regulations, where it is made to read (R. 60):

> "Pass John Smith, *car,* and five officers and employees. Account President, officers, and employees of X. Y. Z. Ry."

This is a clear and an express recognition by the Commission of the practice and of the legality of a carrier's hauling free of charge a foreign car when occupied by a person or persons entitled to use, and using, free transportation.

It will be noted that the Pass Regulations just referred to were promulgated by the Commission on January 1, 1917, which was *after* the practice of one carrier's hauling the car of another carrier free when occupied by a person entitled to use, and using, free transportation had been expressly

brought to its attention, as above shown, in the *Tap Line Case*, in the *Colorado Free Pass Investigation*, and in the *Five Per Cent Case*, to which in detail attention has hereinbefore been invited. It seems appropriate to go into this detail because the Commission in its report, at page 790, endeavors to escape the effect of its action in its Conference Rulings and in its Pass Regulations by saying (R. 37):

> "Under these circumstances we think that the pass form should be given a construction in harmony with the law."

In other words, in the Commission's view it should be construed, notwithstanding the language used by the Commission as above quoted clearly and unmistakably declares the contrary, as not referring to the moving by one company of the business car of another. This is because the Commission is here attempting to declare that construction as not "in harmony with the law," and accordingly, in order to escape that consequence and in defiance of its obvious meaning, the Pass Regulations and the Conference Rulings must be construed to mean the moving by a company of its own business car, the exact opposite of what they expressly say.

No such interpretation of the Commission's Rulings or Regulations is possible or permissible.

Pursuing this subject further, attention is called to the fact that Regulation No. 2 of the issue of 1917, now in force, and in force for many years in the past, includes among the general classes of

passes that the Commission states may be issued, the following (R. 57):

> "(d) Annual or term passes for passage, including meals and sleeping parlor, and other accommodations.
>
> "(e) Trip passes for passage, including meals and sleeping parlor, and other accommodations."

The Commission does not undertake to make any restriction upon what these other accommodations may be. It was evidently of opinion that any appropriate accommodations may be lawfully given free to a person entitled to use, and using, free transportation. And this is made certain by the subsequent clause in the same Pass Regulation, heretofore quoted, reading as follows (R. 60):

> "Pass John Smith, President, car, and five officers and employees of the N. Y. Z. Ry."

It seems obvious that the Commission cannot escape the results of its deliberate acts, extending over a period of years, in which the lawfulness of this practice is recognized, by now saying that all that it has previously said must be construed to relate to the moving by a carrier of its own business car, and that this must be done because that is the only thing that the law will permit. The question here is what the law will permit. And as bearing on this subject the uniform conduct of that branch of the government which administers the law, in construing it over a long period of years, would have great weight even in a doubtful case as to what the true construction is. But it is

submitted that in this case the construction insisted on by the appellants is not even doubtful.

It is not without significance in this connection that Form 17, prescribed by the Pass Regulations of 1917 (R. 87) for a request by one carrier on another for annual or term passes, prescribes that, in a blank left under one of the columns of the request, headed Remarks, "shall be shown the character of any accommodations requested, other than passage." This without any limitation in respect to what the accommodations may be, and the word is broad enough to include the then well known method of accommodations in a business car of a foreign line.

So that it seems abundantly clear that free transportation as permitted under the Interstate Commerce Act, properly construed, and also, as expressly construed by the Commission, is not limited as to the character of the accommodations, but may include any appropriate means or character of transportation, even transportation in an official car, whether owned by the carrier performing the service or by a foreign line. This, as stated, is distinctly recognized not only by every implication of the Regulations and of the Conference Rulings, but in express terms by the Conference Rulings and Pass Regulations above quoted, which mention in terms a car of another line among the things which may be carried free as a part of free transportation, and which were promulgated with full knowledge of the practice referred to and after that practice had been pointedly called to its attention in a number of cases,

in all of which it refrained from declaring the practice unlawful, as it would have been its duty to do, if it had thought so.

It is obvious that the Commission, throughout its administration of this law as above indicated, has considered and has treated the movement of the car of another line, when used for the purpose of transporting a person entitled to use and using free transportation, as an incident of such free transportation.

It is accordingly respectfully submitted, as heretofore shown, that a private or business car belonging to a foreign line may be lawfully carried free not only as a means of honoring its own contract for free carriage of a passenger, but also as an incident of the free transportation of persons which the law permits.

(b) *Construction of a Statute by an Administrative Body Always Entitled to Great Weight, and, Unless Clearly Wrong, to Determining Weight*

Section 6 of the Act (the tariff section) plainly applies, as we think, to an ordinary shipment of property, which is substantially different from the transaction here under discussion; but if we assume the law to be doubtful in meaning, which is the most the appellees can hope for, then we invoke the familiar rule of law that the construction of a statute by an administrative body is always entitled to great weight, and unless clearly wrong, to determining weight.

The uniform and long-continued construction of

the law to the foregoing effect by the Commission charged with the duty of administering it would be accepted by the courts as a proper construction, even if that construction were doubtful.

The court below holds (R. 106) that the Act, in the respect here being considered is *clear and unambiguous;* in other words, that it is not doubtful. It is difficult to see how it can be considered, by persons opposing the appellants' view, that any more can be claimed for it than that the construction is doubtful, in view of the uniform construction of it by the Commission and of the carriers for 42 years, which construction was directly contrary to the construction put upon it by the court below.

The rule of construction above stated is so familiar as to hardly need discussion of authorities beyond the citation of a few for convenience.

The latest case upon the question is the decision of Chief Justice Taft in the case of *Wisconsin v. Illinois*, 278 U. S. 367, 413 (1929). The question there presented was the proper interpretation of an Act of Congress, section 10 of its Act of March 3, 1899, which prohibited the creation of an obstruction not affirmatively authorized by Congress to the navigable capacity of the waters of the United States. This was construed as authorizing the Secretary of War, upon recommendation of the Chief of Engineers, to determine what obstructions could be placed in the navigable waters. It was contended that this construction was erroneous and that only Congress could make the determination. It seems that the construction

just mentioned had been acted upon by the government officials continuously from a short time after the passage of the Act. Accordingly, this practical construction, because used by the War Department for a long time, was accepted by this Court as the true construction of the statute, the Chief Justice, at page 413, saying:

> "This construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. *Nothing is more convincing in interpretation of a doubtful or ambiguous statute. United States v. Minnesota*, 270 U. S. 181, 205; *Swending v. Washington Water Power Co.*, 265 U. S. 322, 331; *Kern River Co. v. United States*, 257 U. S. 147, 154; *United States v. Burlington & Missouri River R. R.*, 98 U. S. 334, 341; *United States v. Hammers*, 221 U. S. 220, 228; *Logan v. Davis*, 233 U. S. 613, 627."

We have heretofore shown the long continued and uniform construction of the Interstate Commerce Act by both the Interstate Commerce Commission and the carriers, to be that the handling by one railroad of another's office car, when appropriately occupied, is lawful and proper.

So much for a construction by the governmental authority charged with the administration of law. The courts, however, have gone farther and held that the construction by the carriers is also of great weight. A notable instance of this is the case of *United States v. Erie R. R.*, 236 U. S. 270. This case involved the pass provisions of the Interstate Commerce Act under which the Commis-

sion had made a ruling that passes could not lawfully be issued in favor of officers or employees of carriers not subject to the Act—officers of transatlantic steamship lines. It appeared that the Commission had made a Conference Ruling to the effect that these persons were not entitled to receive passes, but that ruling was never insisted upon and the carriers continued the practice of issuing such transportation. When, however, the question finally came up for determination in the case cited, the Commission insisted that its Conference Ruling was an interpretation of the Act which should have great weight with the Court. Concerning this the Court, page 270, said:

> "Counsel invoke a line of cases which decide, it is contended, that a contemporaneous construction of a statute by the officers upon whom is imposed the duty of administering it is entitled to weight, and, unless clearly wrong, to determining weight. The cases are familiar, the doctrine they announce a useful one, and we are brought to the inquiry, Does it apply in the case at bar?"

The Court, however, refused to apply the rule in that case because it had never been enforced, whereas the custom of the carriers had been uniformly the other way. The Court said at page 270:

> "But these rulings were never enforced and the custom of carriers was uniformly the other way. Against a mere verbal construction, therefore, permitted to languish in inactivity, we have the unopposed practice of the companies."

The Court thereupon considered the question and, on the law, found that the Commission was clearly wrong in its interpretation. This unopposed practice of the companies was followed by this Court even in a case where the Commission had ruled the other way. How much more certainly will the courts follow a practice which has been universal on the part of the carriers and which has, over a long period of time, been approved in express terms by the Commission.

4 The Reenactment of the Statute by Congress Without Change After This Course of Long Continued Construction by the Commission, Reads the Construction Into the Statute

In addition to amending several times these sections of the Interstate Commerce Act without negativing this construction, Congress in 1926 reenacted the entire Act. It thus adopted and "read into" the Act the Commission's long continued interpretation of it.

In *United States v. Hermanos y Compania*, 209 U. S. 339, this Court said:

> "We have said that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution. *Robertson v. Downing*, 127 U. S. 607; *United States v. Healey*, 160 U. S. 136. And we have decided that the *reenactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction. United States v. Falk*, 204 U. S. 143, 152."

See also the case of *National Lead Co. v. United States*, 252 U. S., page 146, where the Court says:

> "The reenacting of the drawback provision four times, without substantial change, while this method of determining what should be paid under it was being constantly employed, amounts to *an implied legislative recognition and approval of the executive construction of the statute*, *United States v. Philbrick*, *supra*; *United States v. G. Falk & Brother*, 204 U. S. 143, 152; *United States v. Cerecedo Hermanos y Compania*, 209 U. S. 337; for Congress is *presumed to have legislated with knowledge of such an established usage of an executive department of the Government*. *United States v. Bailey*, 9 Pet. 238, 256."

The list of authorities might be extended indefinitely to show that where Congress reenacts a law, to which a well known and long continued construction has been given by the branch of the government charged with its administration, the legal effect would be the express adoption by Congress of the long continued administrative interpretation. Reference may be made to the following cases:

Copper Queen Consolidated Mining Co. v. Territorial Board of Equalization, 206 U. S. 474.

Nagle v. Loi Hoa, 274 U. S. 475.

Norfolk Southern R. R. Co. v. Chatman, 244 U. S. 276.

United States v. Falk, 204 U. S. 143.

In the case of *New York, New Haven & Hartford R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, the Court says, at page 401:

> ". . . we concede that the interpretation given by the Commission in those cases to the act to regulate commerce is now binding, and as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least until Congress has legislated on the subject. We make this concession, because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the reenactment of the statute without alteration in the particulars construed, when not plainly erroneous, *must be treated as read into the statute.*"

It follows from the cases cited that Congress has adopted and approved the long continued construction of this Act given by the Interstate Commerce Commission; and this, apart from all other considerations, would, it is respectfully submitted, be conclusive of the case.

For Congress in the Transportation Act, 1920, restudied the whole Interstate Commerce Act and amended it without changing the provisions here involved, and in the Codification Act of 1926 reenacted the pass provisions of the Interstate Commerce Act—all after the long and well known construction given them by the Commission.

In this case, it is interesting to note that the prevalence of the practice was expressly made known to Congress by the *Five Per Cent Case, supra*, the record of which was printed, as we have seen, as a Senate Document (R. 119).

The report, in reaching the conclusion that, because a private or business car is physical property, it must be handled as an article of commerce under a tariff and charged for as freight, loses sight of three fundamental and well established canons of transportation and of law.

(a) That a private or business car, although physical property, may be handled as a facility or instrumentality of commerce, in contradistinction from an article of freight that is shipped, in which event it is not shipped as property, is not subject to a tariff, has been made the carrier's own car by its using it in the performance of its transportation service and need not be charged for;

(b) That the handling of such a car without charge, when used as part of lawful free transportation of a person, is in itself, and has from the beginning been recognized by the Commission as, entirely lawful both for the reason above given in (a) and also because it is an appropriate incident of the free transportation which the law permits;

(c) That by the reenactment of the pass provisions of the Interstate Commerce Act by Congress after this long continued and well known construction of the law by the Commission acting in its administrative capacity, Congress has expressly adopted and ratified this construction and "read it into the statute."

III

THE MOVEMENT DOES NOT VIOLATE THE DISCRIMINATION PROVISIONS OF THE INTERSTATE COMMERCE ACT

It should be here repeated that neither the appellants here are, nor were they as the petitioners below, attacking in this suit the Commission's finding, stated in paragraph No. 3 above quoted, namely, that it amounts to unlawful discrimination to transport *pay* passengers in private cars, furnishing them therein berths and other accommodations, at the same rate charged *pay* passengers provided with only ordinary coach accommodations. The only form of unjust discrimination which the Commission found other than that just mentioned, and consequently the only one here involved, is stated by the Commission in its paragraph No. 2, as follows:

> "That it is unjustly discriminatory and unduly preferential and prejudicial to haul such private cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and revenues for the movement of privately-owned or chartered cars."

It will be observed that neither in finding No. 3 (which for the purposes of this case is not contested but accepted) nor in finding No. 2, just quoted, is there any finding by the Commission of unjust discrimination as between the *passholder* and the *pay passenger*—the alleged discrimination upon which the lower court rested its decision.

The last mentioned form of discrimination, as to which the Commission made no finding, is, for

the reasons and on the authorities hereinafter cited at pp. 82-84, not in the case.

The only issue as to unjust discrimination here presented is whether the hauling of private or business cars of other carriers free, while imposing a tariff charge on the movement of privately owned or chartered cars, constitutes unjust discrimination as held by the Commission.

While the Commission must find unjust discrimination before the question can be considered by a court, yet it is well established that the courts will review and reverse the Commission's finding if it is not supported by the evidence.

New England Divisions Case, 261 U. S. 184, 203.

Manufacturers Ry Co. v. United States, 246 U. S. 481.

Florida East Coast Ry. Co. v. United States, 234 U. S. 185.

Pennsylvania Co. v. United States, 236 U. S. 361.

Phila. & Reading R. R. Co. v. United States, etc., 240 U. S. 334.

I. C. C. v. Louisville & Nashville R. R. Co., 227 U. S. 91.

From the syllabus of the last mentioned case, page 88, the following is taken:

> "A finding without evidence is arbitrary and useless," (baseless) "and an act of Congress granting authority to any body to make a finding without evidence would be inconsistent with justice and an exercise of arbi-

trary power condemned by the Constitution."

"... if the finding is indisputably contrary to the evidence; or if the facts found do not, as matter of law, support the order made" the order is void.

In the text of the decision, at page 92, this Court says:

"A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.'"

At page 93 this Court says:

"In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding."

"To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

B. & O. R. R. v. U. S., 264 U. S. 265.

The list of authorities to the foregoing effect might be extended indefinitely. They state principles of law which are well understood and universally accepted. There must be sufficient evidence in the record to support the finding of the Commission; otherwise the finding is void.

The only fact which the record discloses as to the alleged unjust discrimination created by the handling free, by one carrier of the business cars of another, while a charge is made for the hauling of private cars, otherwise privately owned or chartered, is that in the former case they are hauled free and in the latter case a charge is imposed.

An inspection of the report of the Commission (R. 127) and of the condensation of the evidence (R. 117) will confirm this statement and will show that the Commission had before it *no evidence or fact bearing on the subject except that there existed the above mentioned difference in treatment.*

There was no evidence whatever to show that the difference was unjust or constituted an undue or unreasonable preference or advantage in favor of the carrier-owned car.

In this connection it must be remembered that

> "It is not all discriminations or preferences that fall within the inhibition of the statutes; only such as are unjust and unreasonable . . . Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust."
>
> *Interstate Commerce Commission v. B. & O. R. R.*, 145 U. S. 276-7.

In Judson on Interstate Commerce (Third Edition), page 338, appears the following statement in respect to the provisions of section 2 of the Act:

> "discriminations are 'unjust' and violative of this section: *First*, when the service is like and contemporaneous; *second*, when it is rendered in the transportation of a like kind of traffic, and, *third*, when the service is rendered under substantially similar circumstances and conditions. That is, all three of these conditions must concur."

There Is No Unjust Discrimination Nor Undue Prejudice or Advantage Here Involved:

(a) *Because, if it is lawful under the statute to move the carrier-owned car free, the statutory provisions which permit it would "limit, or define, the requirement of equality of treatment which is imposed in other sections of the Act"* (Nashville Case, 262 U. S. 363) *even if they would be otherwise broad enough to cover; and no unlawful discriminatory conditions can arise, from a mere difference in treatment which the law permits, in the absence of an affirmative showing that the lawful act is being used to accomplish an unlawful purpose or result.*

Of course, if the Court should hold, as the Commission has held in paragraph 1 of its holdings hereinbefore quoted, that the movement free of the carrier-owned car is prohibited by the Act and is consequently in itself unlawful, then, of course, that is the end of the case.

But if the Court should hold, in accordance with the contentions of the appellants, that such free movement, when the car is occupied by a person or persons lawfully entitled to use, and using, free transportation, is not prohibited by the Act and is therefore in itself lawful, it necessarily follows that the basis for a claim of unjust discrimination or undue prejudice or advantage is destroyed (as no unlawful discrimination, prejudice or advantage can exist in respect to an act made lawful by the statute) unless there is an affirmative showing that the lawful act, in the particular case, is being used to accomplish an unlawful purpose. In other words, if the Act permits the movement free of office or private cars when occupied by a person or persons lawfully entitled to use, and using, free transportation, the Act thereby creates an exception and takes such lawful movement out of the discriminatory provisions of the Act, and out of the field of unlawful discrimination, prejudice or advantage, in the absence of the affirmative showing above indicated. That there was no evidence whatever before the Commission making, or bearing upon, such affirmative showing, will, as above stated, appear from an inspection of the record (R. 117).

An illustration of such an affirmative showing is furnished by the case of *Nashville, Chattanooga & Saint Louis Railway v. Tennessee*, 262 U. S. 318.

In that case this Court had before it the question of whether or not certain rates fixed by the State of Tennessee unlawfully discriminated against interstate commerce. The court said:

"Whether this section" (referring to section 22 of the Interstate Commerce Act) "should be construed as denying to the Interstate Commerce Commission power to prohibit such reduced rates, even where they result in unjust discrimination or in undue prejudice to interstate commerce is the main question for decision."

In this case it appeared that the Commission had, under the Transportation Act, authorized a general increase throughout Southern Territory of 25 per cent on interstate freight rates. The State of Tennessee made a like increase on certain intrastate rates, but undertook to except, from this increase, rates on certain road materials when consigned to Federal, State, county or municipal authorities. The carriers at once saw that this would give an enormous advantage to quarries within the States, as against quarries situated over the line in other States, as the latter would be forced to pay the higher interstate rates. They accordingly applied to the Commission for an order requiring the Tennessee commission to increase these state rates to the level of the interstate rates and thus prevent a clear discrimination against interstate commerce. Paragraph (4) of section 13 of the Interstate Commerce Act gives authority for such action to the Interstate Commerce Commission in respect to the rate orders of a State commission. The discrimination being obvious and it being clear that, under section 13 (4) of the Interstate Commerce Act, it was within the power of the Interstate Commerce Commission to remove it by increasing the State

rates, the Interstate Commerce Commission found that unlawful discrimination did exist and entered an order requiring the increase of the State rates so as to remove the discrimination. The State commission filed its suit attacking the validity of the order, and the lower court held the order to be void. The contention of the State Commission was that, under Section 22 of the Act, railroads were expressly permitted by law to transport property free or at reduced rates for the United States, State and municipal governments and for charitable purposes, etc.

This Court held that, although it was lawful for a carrier to give reduced rates to the United States, State and municipal governments, this could not be done if the lawful act of giving the reduced rates had the effect of creating an undue, unjust and unlawful discrimination against other shippers, and the power expressly given to the Commission by section 13 (4) of the Act came into play and empowered the Commission to prevent it. This it did because there was a glaring discrimination between shippers of the same class, one within and the other without the State, due to the shippers within the State, with lower rates, having a great advantage over those out of the State, who had to pay higher rates, even though the quarries of both might be close to the line and call ordinarily for the same rates.

There would have been no discrimination if the rates, both interstate and intrastate, had been constructed upon the same base level. The vice of the State commission's action lay in the fact

that it brought about discrimination as between different shippers of road material, that is, between shippers of the same class, and hence was unlawful discrimination against interstate commerce.

In reality the case did not come within section 22 of the Act, because the carrier not only had not exercised discretion to carry at lower rates for the government, but in the case was attacking the order of the Tennessee commission requiring it to do so. But, even if it had exercised such privilege and the section thus had become operative, this Court indicated that if the facts in the case showed that this discretion of the carrier was being exercised *to promote an unlawful purpose* it could not stand. Of course, a perfectly legal act may be used for such an unlawful purpose as to render the use of the legal act in that connection unlawful. It is lawful for a carrier to spend its own money, but it cannot spend it for an unlawful purpose, such as to give rebates to some of its patrons.

This principle is also illustrated in the *Tap Line Case,* where, although it is lawful to issue a free pass, the Commission held it was not lawful to issue it to a person engaged in business to be used so as to give a substantial and unlawful advantage over a competitor to a person or industry engaged in a commercial business. And so, in the *Nashville, Chattanooga & Saint Louis Case* above mentioned, if the carrier were to enter into a combination with a quarry furnishing stone to the government and in competition with another quarry competing for the same government business, and were

to attempt to use the discretion of a lower rate to the government for the purpose of throwing all of the business to the favored quarry or to enable it to sell at a higher net profit than the other, the perfectly lawful act of carrying at a lower rate for the government would become so associated with an unlwaful purpose as to be itself unlawful. This, however, in no way militates against the contention of the appellants that, as to any lawful use, the Act excepts from its discrimination provisions the granting of such free transportation as the Act permits.

It must also be borne in mind that the Commission and the Court in the *Nashville Case* were dealing with a commercial transaction. Under section 22 it would have been the right of the carrier to prefer a governmental agency; but it is not the right of the carrier, in extending this preference, to destroy the business of one selling a given material, by giving a preference to his competitor. This was the viewpoint of the Court when it indicated, on page 323, that it is entirely proper to grant a lower rate so that the government may benefit, provided no person or class of traffic is thereby unduly prejudiced. It is pointed out that the discrimination becomes undue and unlawful when the effect is to give the government business to a quarry within the State, while denying quarries without the State the right to compete.

The case at bar, however, does not deal with commercial transactions. It has no competitive feature whatever. The railroad officer using an office car is not in competition with a revenue pas-

senger using his own car. The revenue passenger is not injured at all by reason of the fact that the railroad officer travels in an office car. The commercial, and therefore, the competitive, element is entirely lacking. Stated in another way, the alleged discrimination is not *between members of the same class.*

The public is divided by the Act in two classes, revenue passengers and pass passengers, and difference in the treatment of these two separate classes, in respect to the movement of the cars which they occupy, cannot in itself constitute unlawful discrimination.

Bearing on this subject, this Court, in *Interstate Commerce Commission v. B. & O. R. R.*, 145 U. S., at page 282, quoted with approval the following:

> "To come within the inhibition of said sections," (referring to sections 2 and 3 of the Act) "the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons, or classes, between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination."

Congress, for reasons satisfactory to itself, the wisdom of which cannot be here inquired into, saw fit to divide the public into two distinct classes, and declared as to the one that the carriers may transport them free of charge, but that all the rest of the public, constituting the other class, must pay certain fixed fares definitely prescribed in tariffs promulgated by the carrier and filed with the Commission. This difference thus created by Congress constitutes a discrimination, but it is a lawful discrimination. That this is the meaning of the Act is definitely declared in the *Nashville Case,* where the Court, after drawing the distinction between the use of free or reduced transportation for a lawful purpose and for an unlawful purpose, specifically states that the object of the statute is to permit *"the preferential treatment of certain classes of shippers and travelers."* Particular attention is called to the Court's clear statement of this principle at page 323:

> "Section 22 must in this matter, as in others, be read in connection *with the rest of the act,* and be *interpreted with due regard to its manifest purpose. Robinson v. Baltimore & Ohio R. R. Co.,* 222 U. S. 506, 511. Congress did not intend, by this provision concerning *reduced rates and free transportation,* to create an *instrument,* by which the carrier was authorized, in its discretion, *to subject interstate commerce to undue prejudice,* or by which the State was empowered to compel the carriers so to do. The object of the section was *to settle, beyond doubt, that the preferential treatment of certain classes of shippers*

and travelers, in the matters therein recited is not necessarily prohibited. And in this respect its provisions are illustrative, not exclusive. It *limits, or defines, the requirement of equality in treatment which is imposed in other sections of the act.* By so doing, *it preserves the right of the carrier theretofore enjoyed of granting, in its discretion, preferential treatment to particular classes in certain cases.*"

In this connection it is interesting to quote the following from the case of *Postal Telegraph Co. v. Tonopah & T. W. R. R. Co.*, 248 U. S. 471:

> "Nothing is gained by referring to the provisions in other sections or to those of the section to which the proviso is attached, for the provision is that nothing in the act, in whatever section it may occur, shall be twisted into preventing the exchange. *The passion for equality sometimes leads to hollow formulas and the attempt to bring these arrangements under the head of undue preferences and the like hardly seems a natural result of the statute.*"

In the case at bar, however, in view of Congress itself having created the discrimination between the two classes named, it is beyond the power of the Commission to hold that such discrimination is unlawful, *except when it is shown that it is being used for an unlawful purpose.* Examples of such an affirmative showing are given in the cases above cited, beginning with the Nashville case; but in this case no such affirmative showing was made or even attempted. If the Commission had the

power just referred to, it could completely annul the exceptions to the Anti-pass Act, since they necessarily bring about pronounced discriminations.

Of course, there is no possibility of transportation which the statute permits to be given free being considered in the same class as transportation for which it is necessary to impose a charge, and, as between the two, nothing that is done in favor of free transportation can be in and of itself unlawful discrimination. The Interstate Commerce Commission itself, by its Conference Rulings (Rulings 33, 208 (e), 218), recognizes that traffic carried at reduced rates under section 22 is excepted from the requirements of the Act as to the filing and observance of tariffs. And the same view is expressed in *United States v. Union Pacific R. R. Co.*, 28 I. C. C. 524.

The Commission thereby recognizes the legal effect of those portions of the statute making exceptions to the general rules, and states that these exceptions relieve the carriers of the obligations to comply with other sections of the Act.

In fact, this Court has said, in referring to section 22 of the Act (and the same principle applies to section 1):

> "*It limits, or defines, the requirement of equality of treatment which is imposed in other sections of the Act.* By so doing, it preserves the right of the carrier theretofore enjoyed of granting, in its discretion, preferential treatment to particular classes in certain cases. Only in this sense can it be said that the section is permissive. It confers no right

upon any shipper or traveler. Nor does it confer any new right upon the carrier."

Nashville Case, 262 U. S. 323.

If, therefore, the contention of the appellants is sound that a carrier may lawfully handle free the business car of another when occupied by a person lawfully entitled to use, and using, free transportation, and there is no evidence in the case to support the finding that the free movement of the car, lawful in itself, results in producing an unlawful result, there can be no unjust discrimination or unlawful prejudice or advantage.

(b) *Because the difference in treatment here involved does not come within the terms of the statute which forbid unjust discrimination and undue preference or advantage.*

The only two sections of the Act bearing upon undue discrimination or undue or unreasonable preference or advantage are section 2 and section 3.

Section 2 of the Act

This section is expressly confined to a discrimination created by *charging one shipper or passenger more than another.* But such a discrimination is by the express terms of the statute made dependent upon three definite conditions: (1) "a like and contemporaneonus service," (2) "in the transportation . . . of a like kind of traffic," (3) "under substantially similar circumstances and conditions." A reference to this Act will show that *all three of these conditions*

must exist before the carrier can be deemed guilty of unjust discrimination in this matter of charging different compensation for service.

Section 2 of the Act is as follows:

> "Sec. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances, and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

As has been shown above, Judson, the leading text writer on this subject, in his work on Interstate Commerce, Third Edition, page 338, states, as is apparent from an inspection of the Act itself, that *"all three of these conditions must concur"* before unjust discrimination can be found.

Obviously this section of the Act does not apply to the case here presented, for the reason that none of the foregoing conditions, much less all, exists. The two situations are wholly dissimilar. In the case of an ordinary private car for which 25 fares

is charged, the compensation paid is primarily for passenger service, and where as many as 25 passengers are in the car (as often occurs in the case of a chartered Pullman car) nothing whatever would be paid for the car. In the case of the office car, however, there is no element of compensation for the passengers since, under the case assumed here, they are using and are entitled to use free transportation. Therefore, if a charge were made at all it would be solely for transporting the car, whereas in the other instance it is primarily and oftentimes solely for transporting the passengers. Obviously, the two situations are so entirely different that they are not comparable under the standard fixed by the statute we are discussing; that is, they do not concur in the three respects there enumerated, nor in any of them.

Section 3 of the Act

The only applicable part of this section is paragraph (1), which is brief and is here quoted in full:

> "Sec. 3. (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

This simply impiles that there must be no dis-

crimination in the transportation of ordinary private cars; in other words, they constitute a class, all of which must be treated alike. Those movements are revenue movements and are subject to the same tariff provisions. The differences we have noted above apply here and show conclusively that the movement of a railroad office car and the ordinary private car, not being the same class, do not involve discrimination.

There is a marked difference between the conditions surrounding the two movements which are here brought into contrast, namely, the free transportation by one carrier of the car of another when occupied by a person using and lawfully entitled to use free transportation, on the one hand, and the movement of a revenue passenger in his own car, on the other. The contracts which the carrier makes in the two cases are entirely different. In the first its contract is to carry a person entitled to free transportation in some facility which it must provide; but no particular facility may be demanded. In the second case the contract is to carry a person in accordance with the carrier's tariff, namely, to carry the revenue passenger in his own car, with the right to occupy it exclusively, or to carry with him 24 friends of his own selection, and this case is definitely covered by a tariff, and the service may be demanded.

This difference in the contracts shows that there is not "a like and contemporaneous service," nor a transportation "of a like kind of traffic," nor transportation furnished "under substantially similar circumstances and conditions."

It is accordingly submitted, in view of the dis-

similarity of conditions, that the act here involved does not come within the terms of these discriminatory provisions.

IV

THE DECISION OF THE DISTRICT COURT ON THE SUBJECT OF DISCRIMINATION

As we have hereinbefore stated, the District Court did not uphold—in fact, made no decision with reference to—*the propositions upon which the Commission entered the orders herein complained of.* The court based its decision solely upon the proposition that regardless of anything else there was a difference in the treatment of pay passengers and pass passengers—a subject which was not even discussed, much less passed upon, by the Commission—and that this of itself constituted an undue discrimination which should be corrected by some such order as the Commission entered. It is hardly necessary to quote those passages of the court's decision which contain this holding, for it appears throughout the entire decision as the only basis found by the court for sustaining the orders, notwithstanding, as we have heretofore shown, that the Commission made no finding of any such discrimination.

As hereinbefore shown, the Commission made no findings as to unjust discrimination, etc., *as between a pass holder and a pay passenger,* and in the absence of such a finding by the Commission the court had no authority to make such a finding.

> "Whether a preference or advantage or discrimination is undue or unreasonable or

unjust is one of those questions of fact that have been confided by Congress *to the judgment and discretion of the Commission.*"

Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S. 144, 170.

There is no jurisdiction in the court *to take initial action* in making such a finding, because, as stated in the quotation just given, such a question is "confided by Congress to the judgment and discretion of the Commission."

No jurisdiction exists in a court to take initial action in making such a finding, the court's power being confined to reviewing the Commission's finding in the light of the facts disclosed by the record.

U. S. v. Michigan Central, 122 Fed. 544.

P. R. R. v. International Coal Company, 230 U. S. 196.

Manufacturers Ry. Co. v. United States, 246 U. S. 481.

S. A. L. v. United States, 254 U. S. 62.

Nashville C. & S. L. Ry. v. Tennessee, 262 U. S. 318.

"The importance to the commerce of the country of the exclusive, *initial* jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and cannot be overstated."

Director General v. Viscose Co., 254 U. S. 504.

Accordingly, inasmuch as the Commission has made no finding as to unjust discrimination be-

tween the passholder and the pay passenger, no issue as to that is involved in this case and we submit that the court below, in deciding the case on that issue, is plainly in error.

Not only did the Commission make no such finding as the court below indicates, but in its report it expressly found (R. 32) that a carrier may transport its own business car without subjecting it to a tariff charge and its amended Pass Regulations expressly permitted the issue of a pass "for cars owned by the issuing carrier or held by it under lease for use in its business as a common carrier" (R. 45). This by necessary implication permitted the continued use of free transportation in a carrier's own office car and the consequent giving to a pass passenger different and better accommodations than to pay a passenger.

It may, however, be interesting to inquire why the Commission made no such finding.

Whether or not the alleged discrimination relied on by the court—that is, between pass passengers and pay passengers—is such as comes within the jurisdiction of the Commission, depends upon sections 2 and 3 of the Interstate Commerce Act, both of which have been fully discussed in the preceding section.

Noting, first, section 2, it is obvious that in the case of the pass passenger as compared with the pay passenger, the two situations are not comparable and that *not one, much less all, of the three conditions applies.* Both involve passenger transportation, but in all other respects the two are dissimilar. One is transportation under regular pas-

senger service tariffs; the other is exempt from the tariff requirements.

Neither is this the transportation of "like kind of traffic," nor is it rendered "under substantially similar circumstances and conditions," for there is involved in one the movement of a revenue passenger and in the other of a pass passenger, which are not a like kind of traffic nor are they moved under similar circumstances and conditions. They are in no sense comparable, for, as shown above, the only discrimination referred to in that statute is between traffic of the same class, that is, revenue traffic moving under tariffs which fix the charges therefor.

It is apparent that section 3, like section 2, relates only to preference and advantages or discriminations *between members of the same class,* that is, between members of the public other than free passengers. (*Interstate Commerce Commission v. B. & O. R. R.,* 145 U. S., at page 282.) This must be true because the holder of a pass, which entitles him to free transportation while others pay the tariff rates, is, of course, receiving a manifest preference. It is a clear case of discrimination, but it is a legal discrimination, because expressly authorized by the statute. If, then, the holder of a pass was meant to be included in the operation of this section 3, the law would *ipso facto* take away his pass and thus render null the other provision of the Act which authorizes the pass. Obviously, therefore, viewed from any angle, the giving of free transportation to a pass holder, however clear and definite the

preference or advantage, is not a violation of this section 3. If not, then it is because section 3 does not apply to such a case. Assuming, then, as we must, that the giving of the transportation is not unlawful, the matter is sharply narrowed to the inquiry as to whether the one entitled to such free transportation may be given accommodations better than those furnished to the ticket holder. There is no law which forbids this. There is no discrimination between ticket holders, because all of that class stand upon the same footing. They pay a certain sum, for which they receive a certain service. They are put upon an equality with each other, and no injustice, in the sense of inequality, is wrought against them by the fact that some other individual, who has free transportation, receives different or better accommodations. In other words, the two classes of passengers are not properly comparable, and therefore neither unlawful discrimination nor undue or unreasonable preference or advantage between them can exist.

It must be remembered, in connection with this question of the difference of accommodations furnished revenue passengers and those whom the Act permits to be carried free and to be given certain privileges in respect to transportation, that in making this distinction Congress did not do a mere arbitrary or unconsidered thing. The relationship of the free passenger to the railroad industry is very different from that of the ordinary revenue passenger. As a rule, the free passenger is devoting his life to the success and the

development of the railroad industry and the giving of an adequate public service; and Congress, in permitting him to be carried free, is merely recognizing this obvious difference and *establishing an inducement for men to engage in this essential industry,* the attractions of which are limited by strict, and sometimes drastic, governmental regulation.

If the person authorized to receive free transportation is not connected with the railroad industry, there were other reasons, such as passes given for charitable or relief purposes, which, in the opinion of Congress, justified it in separating him as a class from the class required to pay tariff rates.

There is nothing in the Act, nor in any court or Commission decision, which restricts a carrier in the character of accommodations which it may furnish to a free passenger. From time immemorial the carrying line, as a matter of grace, has granted or withheld lawful pass privileges at its pleasure, and has extended to the free passenger whatever character of service it saw fit. He can be transported, if the carrier so elects—and this the Commission in effect concedes in its report—in one of its own office cars, a thing which is constantly done. And, if this be true, no legal reason can be assigned why he can not be carried in an office car which he or his employer is instrumental in securing for use of the carrying line. There is no greater discrimination if he travels in the business car of a foreign line than if he travels in the business car of a home line. This freedom from unlawful

discrimination in affording facilities to free passengers is distinctly upheld by the Commission itself, for, when it modified its Pass Regulations, as hereinbefore set out, so as to forbid a carrier to transport the office car of another carrier over its line, it expressly, or by necessary implication, *reaffirmed the right of the carrier to transport such passengers in its own office cars upon its own line.* So far as the public is concerned, it is just as much an advantage or preference for a railroad to grant office car accommodations in its own cars to passengers on its own line, when pay passengers are confined to the coaches, as it would be if these passengers were in a private or business car owned by another line. There is simply no way to avoid this conclusion as necessarily following from the action of the Commission itself.

Recognizing this, the Commission wisely concluded that it could make no finding of unjust discrimination or unlawful prejudice or advantage between the pay passenger carried in the coach and the pass passenger carried in a private or business car.

It may be said that these same considerations apply to the case of discrimination which the Commission found, namely, the case of discrimination between hauling free a foreign business car occupied by a person entitled to use and using free transportation and making a charge for a pay passenger occupying a car otherwise privately owned. We agree with this view and think that undoubtedly the Commission should have re-

frained in the latter case as in the former from undertaking to find unjust discrimination.

V

CONCLUSION

For the reasons hereinbefore given, it is respectfully submitted that the Commission's orders in this case are based on an erroneous conception of the law and should be set aside on the grounds:

1. That it is lawful, and not unlawful as the Commission declares, for a carrier to select its own facilities and instrumentalities of performing its transportation service, even if that service is furnished free as permitted by the statute, and to procure such facilities or instrumentalities in any way and on any terms it may adopt. Having so secured them and devoted them to the use of rendering such service, the cars become its own for the purpose of the service, do not constitute property which is shipped subject to a tariff, and it is not unlawful to move such cars free.

2. That the movement by a carrier of the car of another, when occupied by a person using and entitled to use free transportation and for the purpose of rendering its transportation service, is an incident of such free transportation to the person, and hence lawful, and not unlawful as the Commission declares.

3. That after the Commission, in its administration of the statute, has over a long and uninterrupted period of time, construed the statute as per-

mitting the free movement of such car of another company when occupied by a person lawfully using free transportation and as a means of performing the transportation service, the courts will give to this administrative construction, unless clearly wrong, determining weight and will adopt it as the proper construction of the statute. This long continued interpretation of the Commission is not only not clearly wrong but, we submit, is clearly right, as appears from the considerations hereinbefore set forth.

4. That after the Commission, in its administration of the statute, has over a long and uninterrupted period of time, construed it as permitting the free movement of such car of another company when occupied by a person lawfully using free transportation and as a means of performing the transportation service, Congress, by reenacting the law, has expressly adopted the construction so declared by the Commission, and the free movement of the car under the circumstances referred to is now expressly permitted by the statute.

5. That, under the circumstances hereinbefore shown, it is not unjustly discriminatory and not unduly preferential and prejudicial to haul the private or business cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and revenues for the movement of privately owned or chartered cars, when such carrier-owned cars are used to perform a transportation service, which the moving carrier

is under contract to perform, as in the case of such car being occupied by a person lawfully entitled to use, and using, free transportation.

Respectfully submitted,

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